IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.5252 OF 2004
IN
CRIMINAL APPLICATION NO.2748 OF 2004
IN
CRIMINAL APPEAL NO. OF 2004

Umesh Kanjibhai Raja ...Appellant
V/s
1. Nitin Rasiklal Parikh
and Anr. ...Respondents.

And

Hasmukhbhai Kanjibhai Raja ....Applicant.

Mr. Prem Sood with Ms. Prerana Janvekar for the applicant.

Mr. A.S.H. Khan with Mr. M.S. Ahmed for respondent No.1.

Mr. D.P. Adsule for the State.

CORAM: V.M. KANADE, J.
DATE : 11TH JANUARY, 2005

ORAL ORDER:

1. This is an application filed by the brother of the appellant for seeking leave of this Court to pursue the appeal on the death of original complainant i.e the appellant herein. It is submitted that, initially, a complaint was filed by the applicant as a power of attorney holder of the original complainant. The said complaint was filed under section 138 of the Negotiable Instruments Act. The Trial Court acquitted the respondent - accused and against the said judgment and order, application for leave to file appeal was filed in this Court and, during the pendency of the

said application, the appellant died on 14/11/2004. Thereafter, the present application has been filed seeking substitution of the applicant's name in place of the appellant for continuing with the appeal.

2. It is submitted that the applicant was conversant with the facts of the present case and he was the power of attorney of the complainant during his life time. The learned Counsel appearing on behalf of the applicant relied upon various judgments of this Court and Apex Court. He has relied upon the judgment of this Court in the case of **Helen C. Pinheiro and others vs. M/s. Kamaxi Steel Products** reported in **2000 CRI.L.J.1622**. He has also relied upon the judgments which are referred to in this judgment including the judgment of the Apex Court in the case of **Ashwin Nanubhai Vyas vs. The State of Maharashtra and another**, reported in **AIR 1967 SC 983**. He has also relied upon the other recent judgments of the other High Courts. He has relied upon the judgment of the Gujarat High Court in the case of **Anil G. Shah vs. J. Chittaranjan** reported in **1998 Cr.LJ 3870**. He has further relied upon the judgment of the Punjab and Haryana High Court in the case of **Harbans Singh and others Vs. Gulzar Singh** reported in **2001 CRI.L.J. 2999**. He has further relied upon the judgment of the

Karnataka High Court in the case of **Jimmy Jahangir Madan vs. Mrs. Bolly Cariyappa Hindley (Decd.) and others** reported in **[2003] 115 Company Cases 770**. He further relied upon the judgment of the Madras High Court in the case of **Indira and others vs. Surgent Magarajan** reported in **2003 CRI.L.J. 2623**. He has, thereafter, relied upon the judgment of Jharkhand High Court in the case of **Ajay Kumar Agarwala and another Vs. State of Jharkhand and another** reported in **2003 CRI.L.J. 3088**. He has further relied upon the recent judgment of the Kerala High Court in the case of **Smt, Bhagava vs. M/s. Sri Kadasiddeshwara Trading Company & Another** reported in **2004(1) Crimes 701**. He has further relied upon the judgment of the Apex Court in the case of **Khedu Mohton and others vs. State of Bihar**, reported in **AIR 1971 SC 66**.

3. The learned Counsel appearing on behalf of the applicant submitted that in view of the ratio laid down in the said judgments, the said application may be allowed.

4. The learned Counsel appearing on behalf of the respondents invited my attention to the provisions of section 394 of the Code of Criminal Procedure. He submitted that sub-clause (2) of section 394

specifically states that every other appeal under the Chapter shall abate on the death of the appellant. He submitted that in view of the specific provision under the Criminal Procedure Code, on the death of the appellant, the present appeal against acquittal also had abated and, therefore, the applicant had no locus or statutory right to continue the appeal and, therefore, the application is liable to be dismissed.

5. The provision regarding abatement of appeal is made in section 394 of the Code of Criminal Procedure which reads as under:-

> 394. Abatement of appeals- (1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.
>
> (2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.
>
> Provided that where the appeal is against a conviction and sentence of death or of

> imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the appellate court for leave to continue the appeal; and if leave is granted the appeal shall not abate.
>
> Explanation- In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister."

On perusal of the said provision, it can be seen that the section contemplates that the appeals under section 377 or 378 shall abate on the death of the accused. Sub-clause (2) is continuation of sub-clause (1) as it starts with the phrase "Every other appeal", meaning thereby that all appeals under the Chapter except the appeals mentioned in sub-clause (1) viz. section 377 or 378 shall abate on the death of the appellant. Thus it is clear that in case of appeal against acquittal which is filed under the provisions of section 378, it shall abate only in the case of death of the accused. The submission of the learned Counsel appearing on behalf of the respondents that the provisions of sub-clause (2) would apply in the present case cannot be accepted. The intention of the legislature appears

to be quite apparent from the said provision as it restricts abatement of appeals only in the case of death of the accused and not on the death of the complainant. There is no other provision under the Criminal Procedure Code which contemplates a situation of abatement in the case of death of the complainant.

The Apex Court in the case of **Khedu Mohton and others vs State of Bihar** reported in **AIR 1971 SC 66** has observed in para 8 of the said judgment as under:-

> "8. From this section, it is clear that an appeal under Section 417 can only abate on the death of the accused and not otherwise. Once an appeal against an acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other. The argument that while introducing sub-section (3) to Section 417, Criminal P.C., the Parliament overlooked the provisions contained in Section 431, does not deserve consideration. The language of Section

431 is plain and unambiguous. Therefore no question of interpretation of that provision arises."

The ratio of the judgment of the Apex Court is squarely applicable to the facts of the present case and it cannot be said that on the death of the appellant, the appeal against acquittal abates. The Apex Court in the case of **Ashwin Nanubhai Vyas Vs. The State of Maharashtra and another** reported in **AIR 1967 SC 983** also has observed in para 8 of the said Judgment as under:-

"(8) In support of his contention Mr. Keswani has cited some cases of the High Courts in which on the death of the complainant the prosecution was held to have abated. Chief among them are Ishardas v. Emperor, (1908) 7 Cri LJ 290 (Lah), Ramanand v. Emperor, 40 Ind Cas 1008: (AIR 1917 Lah 403) and Labhu v. Emperor, 52 Ind Cas 797: (AIR 1919 Lah 409). The first of these cases was a prosecution for defamation and the second a trial for an offence under S. 323, India Penal Code. The third followed the second. The first two cases here mentioned were overruled by the Lahore High Court in Hazara

Singh V. Crown ILR 2 Lah 27: (AIR 1922 Lah 227), wherein it was laid down that such cases do not necessarily abate. Mr. Keswani also relied upon several cases which arose under Ss. 417(3) and 467B of the Code of Criminal Procedure in which appeals were held to have abated. We need not refer to these cases because they arose under different circumstances and were certainly not inquiries with a view to committal under Chap. XVIII of the Code. Mr. Hathi, who appeared on behalf of the State of Maharashtra, drew our attention to many later cases in which it has been held (dissenting from the cases relied upon by Mr. Keswani) that a criminal complaint does not necessarily abate on the death of the complainant even in those cases where the making of the complaint by the person aggrieved is made a condition precedent by the Code. We need not analyse those cases because, in our opinion, unless the Code itself says what is to happen, the power of the Court to substitute another prosecution agency (subject to such restrictions as may be found) under S. 495 of the Code of Criminal Procedure is always available. Reference may, however, be made to the folloiwng : Imperator v. Nur-Mahomed,

(1908) 8 Cri LJ 190(Sind), Emperor v. Mauk Din, AIR 1924 Lah 72: ILR 4 Lah 7, U Tin Maung v. The King, AIR 1941 Rang 202, Muhammad Azam v. Emperor, AIR 1926 Bom 178 and In re Ramasamier 16 Cri LJ 713 (1): (AIR 1916 Mad 1034(1). None of the cases cited either for the one side or the other directly arose under S. 198 first part in a committal proceeding. The later view is distinctly in favour of allowing the prosecution to continue except in those cases where the Code itself says that on the absence of the complainant the accused must be either acquitted or discharge. The present is not one of those cases and in our judgment the Presidency Magistrate was right in proceeding with the inquiry by allowing the mother to carry on the prosecution, and under S. 495 the mother may continue the Prosecution herself or through a pleader. We see no reason why we should be astute to find a lacuna in the procedural law by which the trial of such important cases would be stultified by the death of a complainant when all that the S. 198 requires is the removal of the bar. The appeal fails and it will be dismissed."

In this case also, the Apex Court has taken a view that though the Court cannot substitute the complainant, it has a power under section 495 to authorise conduct of prosecution by any other person. This Court in the case of **Helen C. Pinheiro and others vs. M/s. Kamaxi Steel Products** reported in **2000 CRI.L.J. 1622** has taken a view that the provisions of section 256 are analogous in principle to a case where the complainant has died after final disposal of the criminal case after filing leave to appeal and the same principle will be applicable in such cases. This Court has, after referring to number of judgments of various High Courts has held that the appeal against acquittal would not abate on the death of the complainant. The ratio of the said judgment also would be applicable to the facts of the present case. The ratio of the other judgments relied upon by the learned Counsel appearing on behalf of the applicant also squarely cover the issue involved in the present case.

6. In the result, Criminal Application No.5252 of 2004 is allowed. Applicant is permitted to pursue the appeal and substitute his name in the place of the appellant. Leave to amend is granted. Application is made absolute in the above terms.

V.M.KANADE, J.